1991, the programmer-affiliate of a LEC VDT provider is not a "cable operator" and not subject to Title VI regulation. As the FCC stated in its *First Report*[27] herein:

> Where the "closed transmission paths" and "associated" head-end equipment are owned and controlled by different entities (as in video dialtone), and where different configurations of equipment would be used to move video programming from the different providers to the different customers, the concept of a single, integrated system and unified control are not present.

The Court of Appeals for the District of Columbia upheld this reasoning.[28]

Even where the programmer is an affiliate of a LEC, the transmission equipment and head-end equipment would be owned and controlled by different entities and different configurations of equipment would be used to move programming from providers to customers. In the world of video dialtone, "unified control" does not exist with regard to the total package of services available to the customer precisely because these common carrier transport facilities must carry the programming of multiple programmers. No one entity, therefore, has "unified control."

Since a cable company does not offer video transport to the public, however, the answers are quite different. Under the cable model, one company controls the selection of content and operates the facilities. In this instance, the facilities "transmit" video programming, within the judicial definition of that term, to subscribers and therefore should be subject to Title VI regulation.

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[27] *Op. cit.* at 307.

[28] *NCTA v. FCC, supra*, p. 74.

C. The FCC Cannot And Should Not Apply Any Title VI Provision To A Telephone Company Or Its Affiliate Which Enters The Video Business Under The VDT Model.

1. Cable Regulation And Common Carrier Regulation Do Not Mix Because Their Purposes Are Fundamentally Different.

It should be obvious by now that the FCC cannot merely pick and choose from Titles II and VI of the Communications Act to create a lawful regulatory scheme. The *4th FNPRM* is completely devoid of support for incorporating any provisions of Title VI into the common carrier VDT rules. At the very least, the Commission must identify a problem, specify which "cable" regulation it would adopt to solve the problem, discuss how the regulation would solve the problem and detail a legal basis for importing the new regulation. *Cf. Turner Broadcasting Systems, Inc. v. F.C.C*, 114 S. Ct. 2445, 2470 (1994). Otherwise, the decision will be arbitrary and capricious and in excess of the Commission's authority under either title.[29] As the Commission found earlier in this proceeding, "Congress did not intend to subject telephone companies to the duplicative regulation that would occur if [the Commission] were to find that a cable franchise is also required for video dialtone facilities."[30] Such duplication does not magically become necessary merely because a telephone company becomes a programmer on its VDT platform. The *4th FNPRM*, however, provides none of the requisites for importing Title VI regulations, but simply invites commenters to "pick their favorite flavor of

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[29]For example, 47 U.S.C. § 541(c) prohibits common carrier regulation of cable services, while 47 U.S.C. § 522(7)(c) prohibits cable regulation of common carrier services.

[30]*First Reconsideration Order, supra*, p. 5072.

regulation" and ask politely that it be served.

The fact of the matter is that VDT and cable service operation are based on two completely different regulatory models. VDT is a common carrier service, the essence of which is that the transporter is indifferent to the content and to the identity of the transporting entity. Cable service, on the other hand, is provided by a single packager of video services which combines a unique set of products into specific end-user offerings which it and it alone will determine.

Under the cable model, a cable operator is vitally concerned with the content of the communication. The cable operator is ultimately responsible to the customer for the content of its communication, for the customer must be pleased by the cable operator's choices. Indeed, the cable operator is charged with several responsibilities regarding the nature of content conveyed which are totally inconsistent with a common carrier's duties. For example, a cable operator must control access by children to "adult" programming and is required to provide free access to certain public and community entities. 47 U.S.C. § 532(j); 47 U.S.C. § 531.

By contrast, a common carrier must not provide free service to any group (other than a limited set of classes specified by statute) for fear of the offer being deemed an unlawful rebate or discrimination against the groups not so favored. 47 U.S.C. § 202(a). Therefore, it is totally inappropriate and a violation of the fundamentals of due process and sound administrative practice for the FCC to mix regulatory principles of cable and common carrier regulation together. Rather, the FCC should conclude that the competition which VDT providers (and LECs acting as a second cable services provider) will create should result in less regulation being applied to both cable companies and video programmers using VDT facilities.

LECs offering video services are entering the video services market with no market share and no entrenched customer base. They intend to do competitive battle with well-financed adversaries that have amassed significant alliances with powerful programming sources. Attachment A is an appendix which details these alliances. A cursory review compels the conclusion that the resources of the established video services providers match any that LECs will bring to the tournament. In SBC's view, these two facts alone should convince the FCC that it need not and should not apply any regulation to the video services providers operating under the VDT model.

2. No Aspect Of Cable Regulation Should Be Applied To VDT.

Many of the forms of cable regulation resemble common carrier regulation. For example, a cable company is held to a certain standard of customer service (Section 8 of the 1992 Cable Act). Such restrictions are imposed upon cable operators for specific purposes. In many cases, similar but not identical rules apply to telecommunications. Telephone companies and cable companies are required to meet certain (but different) service standards, which include answer intervals and business hours. Imposition of both these rules on a single operation would be difficult and confusing at best.

Most importantly, however, the need for most of these rules evaporates when competition develops. Programmers on VDT networks will compete with at least three other types of full service providers: wired cable companies, wireless providers, and direct broadcast satellite entities.[31] When companies compete for customers, their incentive to answer customer inquiries quickly, fairly and at times convenient to the customer comes from the fact that the customer has a choice. If a telephone company's video service does not meet the quality of the cable competitor, the customer is likely to stay with (or return to) the cable company. If the telephone company does not offer service as good or better than that of the cable company from the outset, the customer may never switch providers. Congress has expressed its approval of lessening regulation when competition in cable services emerges. In the Cable Television and Consumer Protection and Competition Act of 1992, it adopted an objective penetration standard to trigger abandonment of rate regulation. 47 U.S.C. § 543(a)(2). The Commission simply has no reason to import any of the Title VI regulations into a competitive market.

In other instances, some cable regulations have been imposed to cure specific problems which will not materialize in a common carrier structure. Certain types of "buy-through" are prohibited. Program access is strictly regulated. 47 U.S.C. § 628, 47 U.S.C. § 616. Various horizontal and vertical cross-ownership limitations have been imposed. 47 U.S.C. § 533(f). In each of these cases, transference of the cable rule to a common carrier environment is unnecessary because the Title II requirements of strict non-discrimination will serve to protect against that ills these rules are designed to

[31]The legislative history of the Act indicates that much of the current regulation of cable services stems from a perception of the cable companies' domination of the distribution of video programming combined with their exclusive control over their cable systems. *See* House-Senate Conference Report (Report 102-862), "Cable Television Consumer Protection and Competition Act of 1992," pp. 2-4. These conditions will not apply to video programmers using VDT networks, even if the telephone company is one of them (nor, for that matter, to most telephone companies becoming cable operators.)

obviates all need for restrictions on telephone company involvement in video services.[34]

Failing that, however, an easy answer to the Commission's question is at hand. Existing safeguards in Parts 32, 36, 61, 64 and 69 of the FCC rules adequately address the segregation of the cost of providing VDT services from other regulated costs.

1. The Existing Accounting Safeguards for Affiliate Transactions Would Apply to the VDT Model When a LEC provides VDT Services to a Separate Video Programming Affiliate.

The FCC has over seven years of experience with the efficacy of the affiliate transaction accounting safeguards, memorialized in Parts 32 and 64 of the FCC rules. Recently the FCC reaffirmed its confidence in the strength of protection these rules provide. "We conclude that our comprehensive system of cost accounting safeguards has worked well and, as strengthened above, effectively protects ratepayers against cross-subsidization by the BOCs."[35] The FCC further noted that these rules were geared to protecting ratepayers.[36] The application of these rules to a LEC's provision of service to a video programming affiliate is no different than any other affiliate transaction. Therefore, the existing rules should adequately protect non-video services from subsidizing video services and requires no further modification to do so effectively.

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[34]SBC also contends that if the FCC adopts a pure price cap plan - one which does not contain sharing - any lingering concern over cross-subsidy will be eliminated.

[35]*Order*, CC Docket No. 90-623, *Computer III Remand Proceeding*, released December 20, 1991 ¶ 46.

[36]*Id.*, n.85.

prevent.[32]

The Commission asks specifically about the applicability of one provision of cable regulation, the local franchise, to LECs providing programming under the VDT model. For the reasons discussed exhaustively in Section III above, the local franchise requirement would not apply to any provider of video services over a VDT network, but it would apply to a LEC providing cable services.

IV. REGULATORY "SAFEGUARDS" FOR LEC PROVISION OF VIDEO PROGRAMMING OVER ITS OWN FACILITIES SHOULD BE MINIMAL, IF ANY.

A. Current Rules Supply More Than Adequate Protection.

The Commission asks what changes, if any, should be made to the VDT regulatory framework if a telephone company decides to provide video programming under the VDT model, noting that these rules were "premised on the assumption that LECs would not be able to be customer-programmers of their own video dialtone systems."[33] SBC submits that the best answer would be to acknowledge that this change

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[32] A few technical rules designed for safety purposes, such as R.F. leakage rules, are oriented toward the technology used (i.e., coaxial cable) than the services deployed. Such rules may be appropriate to VDT regulation, but only where such technology is used. The FCC should review its technical rules for such congruences and issue another FNPRM itemizing the provisions which should apply to the technology regardless of the service. Of course, in the VDT model these rules will apply only to the VDT network operator, as the FCC has no direct jurisdiction over the VDT programmer-customers.

[33] *4th FNPRM* ¶ 18. SBC posits two models for telephone company provision of video services, the VDT model and the cable model. To fully answer the question within the VDT model, one must distinguish a LEC providing video transport to a separate programming affiliate from a LEC which provides transport to third party programmers and also provides programming itself. Similar distinctions can be made within the cable model. These comments will address the question as applied to each model.

2. <u>The Existing Accounting Safeguards Would Apply to the VDT Model When a LEC Itself Provides Video Programming</u>.

The FCC has also enjoyed more than seven years of experience with the efficacy of the nonregulated accounting safeguards, and has concluded that those safeguards effectively protect ratepayers against cross-subsidization. The system consists of five principal parts:

> 1) The establishment of effective accounting rules and cost allocation standards; 2) the requirements for telecommunications carriers to file cost allocation manuals reflecting the established rules and standards; 3) the requirements for audits by independent auditors of carrier cost allocations, requiring a positive opinion on whether carriers' allocations comply with their cost allocation manuals; 4) the establishment of detailed reporting requirements and the development of an automated system to store and analyze the date; and 5) the performance of on-site audits by FCC staff.[37]

The application of the nonregulated accounting safeguards is a well-tested process which can be relied upon to segregate the costs of providing VDT facilities from the costs of providing video programming. "Because these processes have been updated on appeal as a "... measure reasonably designed to prevent systemic abuse of ratepayers...," the Commission should feel comfortable using this process for VDT.[38]

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[37]*Id.* ¶ 46.

[38]*In the Matter of Separation of Costs of Regulated Telephone Services from Costs of Nonregulated Activities, Report and Order,* CC Docket No. 86-111, 2 F.C.C.R. 1298 ¶ 1 (1987), *modified on recon.*, 2 F.C.C.R. 6283 (1989) ("*Joint Cost Order*"); *modified on further recon.* 3 F.C.C.R. 6701 (1988), *aff'd sub nom Southwestern Bell Corporation v. FCC*, 896 F.2d 1368, 1369 (D.C. Cir. 1990).

3. The FCC has substantial Positive Experience With LEC Provision Of Transport For Content-Laden Services.

The concern of the Commission regarding the general lack of alternative transport facilities[39] for enhanced services do not apply to video services. Telephone company video services will begin life with a 0% market share. More importantly, telephone company facilities are not a "monopoly bottleneck" for the transport of these services. At least three other sources of transport--cable, direct broadcast satellite, and wireless cable - are widely available for a programmer to use to obtain access to end-users. And unlike the typical 50-70 channel offering of most cable companies, the plans of DBS, wireless cable and most LEC-affiliated video services operations are to launch 300-600 video offerings at a time. When cable companies begin to update their networks with digital transmission capability, they will offer comparable services. Thus, the demand for programming will be so tremendous, and the resources that can transmit it so vast, that little if any programming will not be able to reach consumers. Given the intense competition that is likely to develop among four such strong transport sources, it is nearly impossible to imagine that any programming which has any significant consumer appeal, even to the smallest group, will not be provided access to subscribers.[40] Because no bottleneck will exist, no regulatory safeguards are necessary, let alone special VDT safeguards.

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[39] *Amendment of Sections 64,702 of the Commission's Rules and Regulations (Third Computer Inquiry), Report and Order*, 104 F.C.C.2d 958, 1065-1066 ¶¶ 214, 217 (1986) ("*Phase I ONA Order*").

[40] The same argument would suggest that the "must carry" rules are unnecessary for VDT.

The Commission inquires specifically whether LEC provision of both transport and programming raises new concerns about anticompetitive behavior or cross-subsidy that the existing VDT framework does not address adequately.[41] Because both video content services and video transport services will be subject to intense competition, no real concern about cross-subsidy should linger.

4. The Cable Model Should Be Subject To Title VI Only.

A different answer results when one asks the cross-subsidization question about a company providing cable service and telephony over the same network (i.e., the cable model).[42] The nonstructural safeguards do not and cannot apply to a company operating under the cable model. A cable operator's video transport facilities are not "common carrier" facilities, both by statute and by company choice. A cable company's video transport facilities are not "common carrier" facilities because the law provides that cable companies cannot be forced to operate as common carriers. Moreover, no company can be compelled to offer a common carrier service.[43] Thus, the FCC cannot impose the Open Network Architecture rules on a company choosing

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[41]*4th FNPRM* ¶ 34. Once again, one must treat VDT models and the cable models separately, but in both cases the safeguards presently in place are adequate.

[42]From an accounting perspective, if video programming is provided by a LEC affiliate pursuant to the cable model, the Part 32 and 64 accounting safeguards for affiliate transactions would apply to any services the LEC offers to its video affiliate. For example, the leasing of transport facilities would be a nonregulated service provided to the nonregulated video affiliate. If a LEC acts as a cable operator, the nonregulated accounting safeguards would identify the costs of the video services provided by the LEC because the video services are not regulated under Title II and thus properly treated as "unregulated" for accounting purposes. No new rules are needed.

[43]*See Section IV, supra.*

the cable model because this action would transform the video transport capability into a common carrier service. Since the enhanced service rules by their own terms do not apply to common carrier facilities, video service provision by LECs acting as cable operators are not governed by these rules.[44] And since nondiscriminatory access to end-users is an integral principle of Open Network Architecture and its accompanying rules, it would be nonsensical to apply them to a noncommon carrier service.[45]

B. No Special Regulatory Safeguards Are Needed For LEC Video Trials Under The VDT Model.

The Commission queries whether different, perhaps more relaxed safeguards should apply for technical and market trials than for commercial deployments. Both common sense and prior Commission precedent would suggest this very result. In *Computer Inquiry III,* this Commission concluded that the only safeguards needed for technical trials of enhanced services provided on an integrated basis is that the company make an adequate accounting of expenses incurred and that it follow the cost allocation process.[46] For enhanced service marketing trials, a notification process has been put in

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[44]*Phase I ONA Order, supra.*

[45]Application of the Commission's enhanced service rules willy-nilly could lead to serious distortion of the video services marketplace. At least four "pipes" for transporting video programming will be available - cable, DBS, wireless cable, and LECs. Indeed, video rental stores, which are nearly ubiquitous, could be added to the discussion. Yet, of all these alternatives to reaching the consumer, only the LEC "pipe" is currently required to be open to any programmer which wants to use it. The competitive disadvantage to the LEC is obvious. Therefore, the FCC should preserve VDT as an option, not distort it as a mandate.

[46]*In the Matter of BOC Notices Of Compliance With CEI Waiver Requirements For Market Trials Of Enhanced Services, Memorandum Opinion and Order* (released January 30, 1989), ("*Houston Gateway Trial Order*") 4 F.C.C.R. 1266, 1269 ¶ 21.

place which entails fewer safeguards than a commercial deployment.[47] Because of the fact that LECs do not possess a "bottleneck" facility for video services, the Commission has even less reason to seek competitive safeguards for technical and marketing trials of video services than for enhanced services.

Trials in any event pose a lesser threat both to the prices for regulated services and to potential competitors. In a recent order approving a BellSouth VDT trial, the Commission applied this type of reasoning, concluding:

> Because applications to conduct video dialtone trials are limited in scope and duration, a lesser degree of scrutiny can be applied to the economic justification provided in support of the application....Because of the experimental, limited nature of BST's proposal, we find that it is in the public interest to subject the economic support accompanying this trial application to a less exacting level of scrutiny than would apply to an application for permanent, commercial video dialtone service.[48]

Clearly, no "special" regulatory safeguards should be applied to video services trials.

C. <u>The Commission Should Not Apply The VDT 5% Ownership Test For Affiliation In Applying Any Competitive Safeguards To VDT Arrangements</u>.

In the *4th FNPRM* the Commission proposes to apply competitive safeguards to any programmer in which the telephone company owns more than a 5% interest, borrowing the principle from the rules it developed under the telephone/cable

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[47] *Id.*, p. 1273, n.10.

[48] *In the matter of BellSouth's 214 Application to Conduct An Experiment To Provide Video Dialtone Services, Report And Order,* W-P-C 6977 ¶¶ 36, 41.

cross-ownership restriction.[49] Because the rules have a flawed source, however, and because other telephone company affiliations are measured by a different test, the Commission should not adopt this proposal.

The original purpose of the 5% ownership test for affiliation of programmers to VDT providers was to provide an objective test for violation of the statutory prohibition on telephone company involvement in direct programming.

> We also seek to assure that any increase in permitted ownership affiliation between telephone companies and video programmers is consistent with the existing statutory telephone company-cable television cross-ownership statute that forbids ownership and control of video programmers by telephone companies....[W]e conclude that up to a 5 percent voting or nonvoting ownership of video programmers by telephone companies will not violate the statute.[50]

In other words, the Commission was liberalizing its prior views by concluding that up to a 5% ownership would not violate a statute which on its face prohibited any ownership. The Commission admitted as much on reconsideration when it rejected requests to further liberalize the rules to permit up to 49% affiliation.

> We hold that, consistent with the statutory prohibition on provision by LECS of video programming to subscribers in their telephone service areas, a LEC may not hold an ownership interest of 5 percent or greater in a video programmer that offers service in the LEC's telephone service area.[51]

It is no longer necessary for the FCC to be so strict in its interpretation of

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[49] *4th FNPRM* ¶ 20, citing *Second Reconsideration Order* ¶¶ 64-74; *see also Second Report and Order* at 5801, 5819 ¶¶ 36, 71.

[50] *Second Report and Order, supra* ¶ 36 (emphasis supplied).

[51] *Id.* ¶ 64.

affiliation, because 100% outright ownership of a programmer is now permitted as a direct result of the judicial actions nullifying 47 U.S.C § 533. As the Commission pointed out in its prior orders on this topic, numerous other restrictions on telephone company behavior are adequate to prevent anticompetitive conduct. *Id.* Further, the purpose of an affiliate transaction rule is to prevent a company from conducting intra-family business in such a way that it enriches the affiliate at the expense of the other's customers. It is absurd to presume that such behavior will occur where the shareholders cannot extract the gains from the non-regulated company, as when the ownership share is small. Finally, compliance with affiliate transaction rules would be nearly impossible for a telephone company to compel cooperation if it cannot exercise managerial control over the unregulated company. Once again, the Commission is mixing principles of video regulation with telecommunications regulation.[52] It would be far more logical (and lawful) to apply common carrier regulation to the VDT model.

D. The FCC Should Not Adopt Any New Across-The-Board Rules, Especially A Prohibition On Anchor Programmers.

1. Public Policy Does Not Support Further Capacity Use Restrictions And No Need For Them Is Demonstrated By The Commission In The *4th FNPRM*.

The FCC seeks comment on whether it should limit the percentage of its

[52] That this rule is rooted in Title II and not Title VI is borne out by its source. *Second Report and Order*, supra ¶¶ 68 *et seq.*, *citing inter alia Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities,* 97 F.C.C.2d 997, 1013-14 (1984), *recon. granted in part,* 58 RR.2d 604 (1985), *further recon.,* 1 F.C.C.R. 802 (1986).

own VDT platform capacity that a LEC, or its affiliate, may use.[53] As should be clear by now, SBC strongly disagrees with the FCC that any additional regulatory safeguards should apply when a LEC provides video programming, over its VDT network . At least three other networks, wired and wireless, already exist. In fact, the DBS network is accessible by nearly every American home. Because video providers can choose any of these to enter the customers' homes, the LEC network cannot be viewed as a bottleneck. Thus, no nexus for any regulation exists. *A fortiori*, then, no foundation for capacity limitations exists either.

Capacity limitations on any one programmer would not serve the interests of the public or the policies of the Commission because they would not encourage video competition. To be competitive, any alternative to cable services must offer the same array of choices, with roughly the same ease of access, as the cable company. Further restrictions on channel aggregation would only handicap the telephone company alternative to cable services, thereby diminishing the opportunity for real competition with incumbent cable providers and, of course, the benefits to subscribers that only true competition can bring.

The FCC appears distracted by the notion that it must encourage competition among VDT users. This notion distorts the rationale for VDT's creation - to stimulate competition in the video services market. The Commission's confusion may

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[53] *4th FNPRM* ¶ 21, n.45. This limitation, if adopted, must perforce be limited to a LEC which operates on the common carrier model, i.e., offers VDT capacity to other programmers. If the LEC has chosen cable operation, the limit would make no sense, since a cable operator is not required to offer capacity (other than the leased channel requirements) to nonaffiliated programmers.

come from an implicit assumption that LECs control a bottleneck facility for video transport. Such an assumption is patently incorrect, given the other "pipes" which are available. If the FCC clings to the idea of competition among VDT users, it may lose the fight for competition among video service providers.

2. A Limit On The Percentage Of VDT Capacity That A LEC Or Its Affiliate May Use Would Be Arbitrary And Capricious Given The LEC's Common Carrier Obligations.

A limit on LEC use of its own VDT capacity also would be arbitrary and capricious given the LEC's *common* carrier obligations. A VDT platform under Title II regulation is the voluntary offer of capacity to the public on a nondiscriminatory basis. The Commission has made it clear that a LEC must offer adequate capacity to all programmers which demonstrate a concrete interest in obtaining capacity. [54] It would be therefore arbitrary and capricious to impose an overbroad and unnecessary requirement to maintain a specific percentage of excess channels, particularly where the requirement would result in those channels remaining unused.

3. A Maximum Capacity Rule Would Constitute An Unlawful Taking Of The LEC's Property.

The inevitable result of the FCC's suggestion that a LEC's use of its own VDT platform capacity be limited is that some portion of the capacity will remain unused for some period of time, perhaps indefinitely. This follows from the other capacity rules which the Commission has adopted. Because a carrier is required to offer adequate capacity to serve all bona fide programmers initially, and to construct its

[54] *Second Reconsideration Order* herein ¶ 29.

network so as to provide acceptable expandability, the limit can only mean that the LEC must also build a network capable of serving at least one other programmer with the three times the capacity the LEC uses--even if such programmers never materialize. The Commission does not explore whether a LEC will be permitted to earn a return on the investment (or recover the expenses) associated with such excess capacity, but it seems a certainty that it would not, because such investment by definition would not be "used and useful." A Commission rule which requires a LEC to build facilities on which it cannot earn a return confiscates the LEC's property without adequate compensation, in violation of the Fifth Amendment of the United States Constitution.[55] Indeed, the Commission admitted as much when it noted that "...[s]uch a limit...may create a risk that some capacity might go unused."[56] Further, such a capacity restriction would constitute an uncompensated taking of the LEC's property in contravention of the eminent domain clause because the VDT provider is deprived of the use of its own channel capacity by a governmental act without compensation. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982).

It is worth noting that if the Commission chooses to adopt restrictions on the maximum capacity that a LEC or its affiliate may use, it should not also adopt must carry requirements.[57] SBC's opposition to imposition of "must carry" requirements on

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[55]*Cf F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 252 n.6 (1987)

[56]*4th FNPRM* ¶ 21.

[57]The *4th FNPRM* is unclear about whether the video transporter, each of the video programmers or just the LEC affiliate would be saddled with the must carry obligation in a VDT model. (Obviously, the obligations falls on the single video programmer if the cable model is employed.)

VDT providers was exhaustively briefed in comments on the *Third Further Notice Of Proposed Rulemaking* herein and will not be repeated here. It borders on the absurd, however, (and obviously is unlawful) to imagine that a LEC would be limited to 15 or 20 analog channels and <u>also</u> be required to use these channels to provide a free ride to one of its competitors, the broadcast stations. Bearing in mind Jefferson's maxim that "the government that governs best governs least," the Commission should leave well enough alone and choose either must carry or capacity restrictions (if any), but certainly <u>not</u> both.

4. <u>Channel Positioning Rules Should Not Apply Under The VDT Model.</u>

In its discussion of the necessity for channel positioning rules in VDT arrangements, once again the Commission's failure to clearly distinguish the policies underlying cable service regulation from common carrier telecommunication service regulation lead it to faulty conclusions. As a common carrier, a LEC is indifferent to who provides programming over its VDT platform. The strict nondiscrimination standards of Title II are reason enough for a LEC to avoid disputes with its programmer-customers over channel positioning. No more specific rules need be implemented.[58]

E. <u>The FCC Should Not And Legally Cannot Narrowly Limit Ownership Relationships Between LECs And Cable Companies In Their Service Areas</u>.

Incredibly, the Commission announces its intention to continue to limit

[58]Of course, if "must carry" rules are unconstitutional, as SBC argued earlier in this proceeding, the channel positioning rules would be unnecessary and should be abolished for <u>all</u> providers.

telephone company relationships with cable companies in the telco's service territory to the "carrier-user relationship," provision of enhanced or nonregulated services related to the provision of video programming (and then only where the area is substantially served by a VDT platform), and to lease of cable drop wires. On its face, this proposal flies directly in the face of the judicial actions which led to the promulgation of this *4th FNPRM.* The Commission's "goal of promoting competition in the video services marketplace" cannot justify such intrusions on the LEC's right to speak, whether strict scrutiny or intermediate scrutiny is applied. *Cf., Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 592-3 (1983); *Police Dept. v. Mosley*, 408 U.S. 92, 101 (1972). Even if the Commission's actual intent is to limit nonownership relationships thusly, the restriction is unnecessarily strict. Financing and other nonownership relationships between cable operators and LECs could lead to more efficient use of facilities and deployment of capital. Because the premise of these rules, the cable/telco cross-ownership restrictions, has been rendered nugatory, the Commission should hesitate before recodifying it.

F. The FCC Should Not Forbid A LEC To Purchase Cable Facilities.

It follows directly from the analysis that a LEC may choose the cable model over the VDT model that a LEC legally is permitted to purchase cable facilities in-region. It makes no sense to require a LEC to build a network when one is ready and available. Such a policy would be a waste of societal resources. While the FCC's purpose in attempting to inject competition into the video services market is admirable, it should not come at the expense of condemning property to lay idle. The Commission seems frequently to forget that there are other sources of video competition (*e.g.*, DBS, broadcast video) available even in the smallest of communities. And in any event, the Commission should be quite liberal in granting waivers for areas which appear to support only one wire provider of video services. At least one pending legislative proposal would permit purchases in communities of less than 100,000. The Commission should do no less.[59]

G. The Commission Should Not Impose Restrictions On LEC Joint Marketing With An Affiliated Video Services Provider.

1. The Current Enhanced Services Joint Marketing Rules Have Been Successful.

The Commission asks whether it should revisit joint marketing issues in the context of LEC provision of video services over its own network, but it cites no reason to do so. Indeed, this question was quite recently resolved, in the *Second Reconsideration Order,* in favor of no restrictions. Certainly nothing has changed since then, and indeed the FCC's experience with enhanced services would support this conclusion as well. No formal complaints have been filed with the FCC alleging anticompetitive BOC behavior against enhanced service providers, and these rules have been in place for over 6 years.[60] Even though video programming in the cable model is

[59] *Cf. SBC's Initial Comments on Third Further Notice of Proposed Rulemaking*, filed November 7, 1994.

[60] *In the Matter of the Bell Operating Companies' Joint Contingent Petition For Interim Waiver Of The Computer II Rules To Continue Offering Certain Enhanced Services On An Integrated Basis*, (filed November 14, 1994) p. 8.

not an enhanced service,[61] the Commission's prior experience should have taught that LECs can operate in accord with the current joint marketing rules without inhibiting operations of competitors.

2. The Commission should not extend the restrictions adopted for Bell Atlantic's commercial deployment in Northern Virginia to any other provider.

The restrictions adopted by the FCC with regard to the Bell Atlantic VDT commercial deployment in Northern Virginia are counter-productive, unnecessary and without adequate legal authority. As noted above, to the extent that regulation is necessary, the enhanced services rules are more than adequate. More importantly, no basis in fact exists to justify more stringent treatment of video services programming than enhanced services generally. On the contrary, as argued throughout these comments, video services provision should be subject to less regulation than enhanced services generally because three viable delivery alternatives exist in most markets. Because no one can reasonably conclude that LECs are a "bottleneck" for video services provision, adoption of any safeguards designed to prevent abuse of such power would be arbitrary and capricious because they are unnecessary.

Most importantly, imposing any additional rules will severely distort the competitive market the Commission seeks to create. An increasing number of cable companies are entering or planning to enter the telephony business. None of them have been required to provide marketing for their competitors. None of them have been

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[61]A carrier may be a common carrier for some purposes and not for others. *NARUC II, supra,* 533 F.2d at 608.

prevented from packaging telephony and cable, which they surely will do. Just as surely, extension of the strictures of the *Bell Atlantic VDT Order* will prevent LECs from offering such packages in response, and the FCC will have "pre-chosen" the competitive winner. This result is not and cannot be in the public interest.

The Commission subjected the Bell Atlantic Northern Virginia commercial VDT deployment to the *Computer Inquiry III* rules of network disclosure. Here it seeks comment on whether it should extend these rules to all VDT offerings. Again, the answer depends upon whether the LEC is acting as a common carrier VDT provider or as a noncommon carrier cable operator. In the former case, extension of the network disclosure required for enhanced services would be sensible and not overly burdensome. In the latter, disclosure is unnecessary, for without common carrier obligations no unaffiliated programmers will need information about the nature of the network to be deployed. Indeed, disclosure could be counterproductive in such a competitive market, similar to the Commission's reasoning regarding tariffs for nondominant carriers.

3. LEC Provision Of Video Programming Does Not Adversely Impact The Balancing Of The Commission's CPNI Goals Relating To Privacy, Efficiency And Competitive Equity.

In the *VDT Reconsideration Order* and more recently, in an order concerning NYNEX's 214 Application, Docket Nos. W-P-C 6982 and 6983, released March 6, 1995 ¶ 85, the Commission concluded that there was insufficient evidence to conclude that its existing CPNI rules do not properly balance the goals of privacy, efficiency and competitive equity. There is no reason for the FCC to revisit that conclusion, because it was and is correct. There is nothing unique about video services where privacy is concerned. Consumers still expect the companies with which they already do business to use information about that usage to design and deliver new services, regardless of whether those services are telecommunications or video. Consumers still expect the companies with which they do business to safeguard this same type of information from undifferentiated dissemination unless the consumer explicitly consents. The fact that the new service in question is video is irrelevant to these principles.

In the docket implementing the Telephone Consumer Protection Act, the FCC discussed some of the parameters of what it believed to be consumers' privacy expectations. In that docket, the FCC concluded that a "broad" definition of a business relationship was consistent with a consumer's reasonable privacy expectation.[62] The FCC also found that a business relationship with one company could also extend to the subsidiaries and affiliates of that company.[63] The Commission has acknowledged that a consumer's reasonable privacy expectation is not infringed by contact from affiliated companies of a company with whom the customer has a business relationship. Acknowledgement of the premise that residential and small business customers' privacy expectations are not adversely affected by contacts from a company or its affiliates, supports the conclusion that their privacy interests are adequately protected by the existing CPNI rules. When LECs add video programming to their service offerings

[62]*In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order,* CC Docket No. 92-90, 7 F.C.C.R. 8752 ¶ 35 (1992).

[63]*Id.* ¶ 35.

(under the VDT or cable model), will not alter this premise.

The Commission should not forget that violation of a consumer's legitimate expectations of how businesses will use the information they provide in the course of business transactions is the riskiest of commercial behaviors. There is no need for the Commission or any other governmental body to regulate the use of customer information as it relates to privacy expectations of consumers. Moreover, privacy issues are not, and cannot be, limited by market definition or by participant. Accordingly, any limitations on LEC use of its CPNI in marketing video services should be applied to use of cable companies' CPNI in marketing telephony services.

H. <u>With Regard To Fears Of Cross-Subsidization, The FCC Should Merely Apply The Accounting Safeguards Already In Place For Nonregulated Activity And Affiliate Transactions</u>.

The Commission seeks comment for a third time on whether it should rely on the accounting safeguards already in place to prevent cross-subsidization of video service provision by telephony services. As the Commission has twice correctly concluded, these safeguards are more than adequate. Unlike pure economic theory, which would require a service merely to recover its incremental costs to be adjudged subsidy-free, the FCC's accounting guidelines require an attribution of indirect costs and shared costs to any nonregulated service or affiliate transaction. Nothing about video services should incent the FCC to require different and especially more rigorous rules.[64] A brief quotation from the most recent judicial opinion on such matters should suffice.

[64]In fact, more rigorous rules are hard to imagine, unless it would be total structural separation.

Recently, the Ninth Circuit examined price cap regulation and the Commission's cost accounting rules. The Court concluded:

> With the implementation of these measures, the FCC has responded to our concerns about the weakness of its position in *Computer II* and has demonstrated that the BOCs' incentive and ability to cross-subsidize will be significantly reduced.[65]

In the same manner, if a LEC chooses to provide video programming through an affiliate, the current accounting treatment of operating company transactions with that affiliate are adequate safeguards to prevent abuse. Existing Commission safeguards include a broad spectrum of rules, audits and reporting requirements which effectively control the effect of affiliate transactions upon telephony prices, services and consumers.

I. <u>Under No Circumstances Should The FCC Require Structural Separation Of Telephony And Video Provision By LECs</u>.

As the *4th FNPRM* makes so clear, the Commission has dealt exhaustively both with the issue of structural separation generally and with regard to video services in particular. In both cases, the FCC has concluded that the costs of structural separation outweigh the benefits and chose to rely upon nonstructural safeguards. As noted above, these alternatives to structural separation have resulted in an explosion of enhanced service delivery and a genuine improvement of the qualify for over 5 million customers.

If anything, the structure of the video services market presents even less demand for structural separation. As SBC has reiterated throughout these comments, today video programmers already have multiple sources or channels of distribution for

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[65] *People of California v. FCC*, 39 F.3d 919, 926 (9th Cir. 1994).